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PRODUCTS LIABILITY—PROXIMATE CAUSE, INTERVENING CAUSE, AND DUTY

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I. INTRODUCTION

In negligence cases, courts have recognized the necessity of restricting liability for harm caused by careless acts in order to avoid unduly discouraging socially useful conduct.[1] They have devised rules concerning proximate cause, intervening cause and duty as tools for limiting liability. This Article will refer to these rules collectively as "proximate cause doctrines." The policy behind these doctrines is also important in strict product liability cases.[2] Regardless of whether the primary justification for strict liability is loss spreading,[3] deterrence[4] or easing the plaintiff's burden of proof,[5] no one seriously contends that absolute liability for all harm caused by all products is desirable.[6] Proximate cause doctrines are playing an increasingly important role in strict product liability cases in order to keep the scope of liability within proper bounds.

This is occurring because of other changes taking place in the law of strict liability. Originally, courts used the requirement of defect and the related concept of proper use as the primary tools for limiting strict liability.[7] These rules were sufficiently restrictive so that the proximate cause doctrines were not really necessary, although they were sometimes used.[8] The definition of defect, however, has continually evolved in the direction of increasing the

1. H. HART & A. HONORE, CAUSATION IN THE LAW 262 (1959); R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 18-20 (1963).

2. Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 862-64 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 22 (4th ed. 1971); Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 644-45, 659 (1978); Henderson, *Products Liability, DES Litigation: The Tidal Wave Approaches Shore*, 3 CORP. L. REV. 143 (1980); Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755, 767, 784 (1977); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 674-75 (1981); Note, *Manufacturers' Liability Based on a Market Share Theory: Sindell v. Abbott Laboratories*, 16 TULSA L.J. 286, 310-11 (1980).

3. *E.g.*, Passwaters v. General Motors Corp., 454 F.2d 1270, 1277 (8th Cir. 1972).

4. *E.g.*, Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703, 705 (Ky. 1975).

5. *E.g.*, Shepard v. Superior Court, 76 Cal. App. 3d 16, 21, 142 Cal. Rptr. 612, 615 (1977); Schwartz, *Foreward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 459-60 (1979).

6. Phillips v. Kimwood Mach. Co., 269 Or. 485, 491, 525 P.2d 1033, 1036 (1974).

7. *See* Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 63-64, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 701 (1963).

8. *See* Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law*, 8 RUT.-CAM. L.J. 101, 120 (1976) (discussing the question of whether proximate cause concepts would apply in strict products liability cases); *see also* Oehler v. Davis, 223 Pa. Super. 333, 335, 298 A.2d 895, 896 (1972); W. PROSSER, *supra* note 2, § 102, at 668.

scope of liability.[9] There is now a greater number of cases where the product is defective under a very broad definition of defect, and yet, liability is inappropriate. Because the requirement of defect is no longer fully adequate to limit liability in such cases, some body of law must fill the void. Courts are using proximate cause doctrines with increasing frequency to serve this function.

The proximate cause doctrines impose three basic types of policy limits which restrict the scope of liability.[10] One restriction requires that the tortious conduct produce a foreseeable type of harm. Another requires that the harm come about in a foreseeable manner. The third limits recovery to a foreseeable class of persons. Not all courts use all three, but many commonly employ more than one of these limits. The terminology is confusing because courts use a variety of labels to implement these three restrictions. Some courts, for example, might impose one of these limitations as an aspect of duty while others might treat it as a question of proximate cause.[11] Likewise, proximate cause and intervening cause are sometimes interchangeable.[12] This Article analyzes cases dealing with the three policy-based limitations, whether they speak in terms of duty, proximate cause, or intervening cause. This Article will not deal with causation in fact even though some courts include it as an aspect of proximate cause.

These policy limitations are not always mutually exclusive and distinct categories, but are related to one another. That is, there are some situations where one type of policy limit yields the same result as another; they just amount to different ways of saying the same thing. In other cases the different approaches yield distinctly different results. This Article will analyze the relationship of the limitations to one another. This will provide insight into the true nature of the limitations. It will also show when one type of limitation can act as a substitute for another. This information is useful in advocacy because some jurisdictions do not recognize all three limitations. If a lawyer is precluded from making an argument in one semantical context, he may be able to raise the same issue in another context by using different terminology.

There is also a close relationship between the product liability doctrines of defect and misuse on the one hand and proximate cause doctrines on the

9. *See infra* notes 172-85 and accompanying text.

10. Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001, 1001-04 (1932).

11. Venezia v. Miller Brewing Co., 626 F.2d 188, 191 n.3 (1st Cir. 1980); Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 56, 665 P.2d 947, 950, 192 Cal. Rptr. 857, 860 (1983); 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 234-35 (1985); R. KEETON, *supra* note 1, at 80-86, 97; Twerski, *Old Wine in a New Flask — Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 38 (1974); Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 420 (1978).

12. *E.g.*, Schreffler v. Birdsboro Corp., 490 F.2d 1148 (3d Cir. 1974).

other. This is because both sets of rules were designed to serve essentially the same purpose. This Article will explore that relationship in order to provide insights similar to those mentioned above.

Finally, this Article will analyze how the proximate cause doctrines relate to the policy goals underlying the law of strict product liability.[13] After concluding that the present rules further these goals imperfectly, the Article suggests a new approach designed to achieve desirable results more consistently.

The primary emphasis of this Article will be on the application of proximate cause in strict liability cases involving physical harm to person or property. This includes breach of implied warranty cases causing physical harm as well as strict tort liability cases. For purposes of the matters discussed in this Article, the two theories are essentially the same. The major difference between the theories is that warranty law may recognize some contract defenses that do not apply in strict tort cases.[14] The Article will also discuss negligence cases for purposes of comparison and contrast with the strict liability cases. This will show that in products liability cases the proximate cause doctrines are usually applied in the same way under all three theories of recovery.

Because the strict product liability cases borrowed the proximate cause doctrines from the law of negligence,[15] the nature of these limits is better understood by studying their origins. Therefore, this Article will first briefly review the law of proximate cause in negligence cases.

II. NEGLIGENCE

A. *Type of Harm*

Some negligence cases impose liability only where the type of risk that was foreseeable to the defendant actually occurred. If the defendant's negligence causes harm by fire, he is liable if he could foresee the risk of fire, but not otherwise.[16] Some courts do this by using foresight as the test of

13. *See infra* section IV of text.

14. Delk v. Holiday Inns, Inc., 545 F. Supp. 969 (S.D. Ohio 1982); Payne v. Soft Sheen Prods., 486 A.2d 712 (D.C. 1985); Robinson v. Williamsen Idaho Equip. Co., 94 Idaho 819, 498 P.2d 1292, 1296 (1972); Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964 (1978); Reitz & Seabolt, *Warranties and Product Liability: Who Can Sue and Where?*, 46 TEMP. L.Q. 527 (1973); Rheingold, *What Are the Consumer's "Reasonable Expectations"?*, 22 BUS. LAW. 589, 589-91 (1967).

15. Schreffler v. Birdsboro Corp., 490 F.2d 1148 (3d Cir. 1974); Note, *Torts — Proximate Cause in Strict Liability Cases*, 50 N.C.L. REV. 714, 721-22 (1972).

16. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., A.C. 388 (1961).

proximate cause.[17] Others use a duty analysis, reasoning that there is no duty to protect a foreseeable plaintiff from an unforeseeable risk of harm.[18] The result is the same under either approach. Foreseeability of type of harm is a question of fact for the jury.[19]

Other negligence cases extend liability further than foresight. For example, some use a "hindsight" test[20] and others use a "direct results" test.[21] A court using the hindsight test looks at the event after the occurrence and determines whether the injury appears to be a reasonable and probable result of the defendant's conduct.[22] The direct results test extends liability further than the hindsight test. It imposes liability if the "damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act."[23]

The facts of the famous *Polemis* case[24] nicely illustrate the application of both the direct results and the hindsight tests. A worker dropped a plank into the hold of a ship, negligently disregarding a foreseeable risk of damage to person or property by concussion or impact with the plank. This caused a spark which ignited gasoline fumes present in the hold, and the ship was destroyed by fire. The court imposed liability because the fire was a direct result of the worker's negligence even though the risk of fire was unforeseeable. The result would have been the same under the hindsight test. Given the fact of the explosion, it is not surprising that the ship was destroyed by fire.[25] Neither test requires the injury to be foreseeable under this set of facts.

B. *Intervening Causes and Manner of Harm*

In negligence cases most courts, even those that normally use a direct results or hindsight test, use foresight to limit the scope of liability where an independent intervening cause contributes to the result.[26] An intervening cause is an actively operating force that comes into operation after the defendant's

17. *E.g.*, *id.*

18. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 281 comments e-g, § 430 comment a (1966).

19. Ortiz v. City of Chicago, 79 Ill. App. 3d 902, 398 N.E.2d 1007 (1979). *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS 319-21 (5th ed. 1984).

20. *E.g.*, Foley v. Hudson, 432 S.W.2d 205 (Mo. 1968).

21. *E.g.*, *In re* Arbitration Between Polemis and Furness, Withy & Co., 3 K.B. 560 (Court of Appeal 1921).

22. *E.g.*, Foley v. Hudson, 432 S.W.2d 205, 207 (Mo. 1968).

23. *In re* Arbitration Between Polemis and Furness, Withy & Co., 3 K.B. 560 (Court of Appeal 1921).

24. *Id.*

25. *See* Palsgraf v. Long Island Ry. Co., 248 N.Y. 339, 355-56, 162 N.E. 99, 104-05 (1928) (Andrews, J., dissenting).

26. W. PROSSER & W. KEETON, *supra* note 19, at 312.

negligent act.[27] If the intervening force is foreseeable to the defendant, then he could be negligent for not taking precautions against it,[28] but if it is unforeseeable the defendant is generally not liable for the resulting harm even though he was negligent for not guarding against some other risk.[29] Foreseeability of the intervening cause is a question of fact for the jury.[30]

To illustrate, suppose the defendant negligently moors the plaintiff's ship in such a location as to create a risk that foreseeable winds and waves will break it loose. If this very accident happens the defendant will not be excused. Even though the winds and waves were intervening causes, the defendant was negligent because he disregarded the risk that these forces would intervene. If, however, after negligently mooring the ship, lightning strikes the ship, setting it afire, the defendant will not be liable because this intervening cause was unforeseeable. In intervening cause cases the divergent tests for limiting liability are not utilized because all courts tend to use the same test as a limit on liability.

In "direct results" and "hindsight" jurisdictions the scope of liability is dramatically narrowed in cases involving intervening causes. In the *Polemis* case[31] the risk of fire was unforeseeable to the defendant, but there he was held liable. The case is distinguishable from the foregoing example only in that the risk of fire was unforeseeable because of the unknown preexisting condition of the gasoline fumes in the hold of the ship, rather than because of an unforeseeable intervening cause, such as lightning, arising after the defendant acted. In a later section, this Article analyzes why the presence of an intervening cause should make such a difference.[32] The important point for the moment is that most negligence cases use foresight to limit liability where independent intervening causes are involved.

Negligence cases commonly recognize an exception to the rule that the intervening cause must be foreseeable. If an unforeseeable intervening cause brings about the very result that was foreseeable, then the defendant is nevertheless liable.[33] Suppose the defendant fails to clean gasoline fumes out of a barge and thereby creates a risk of fire caused by careless smoking. He is liable for the resulting fire even if it is caused by an unforeseeable intervening cause such as lightning.[34]

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27. *Id.* at 301.

28. *Id.* at 303.

29. *Id.* at 312. There are some exceptions to this rule. *See id.* at 306 (normal intervening causes); *id.* at 316 (an unforeseeable intervening cause brings about a foreseeable result).

30. Passwaters v. General Motors Corp., 454 F.2d 1270, 1273-76 (8th Cir. 1972). *See generally* W. PROSSER & W. KEETON, *supra* note 19, at 319-21.

31. *In re* Arbitration Between Polemis and Furness, Withy & Co., 3 K.B. 560 (Court of Appeal 1921).

32. *See infra* notes 201-04 and accompanying text.

33. W. PROSSER & W. KEETON, *supra* note 19, at 316.

34. Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (6th Cir. 1933).

Such cases involve the question of whether manner of harm, as opposed to type of harm, must be foreseeable. In fact, some courts analyze cases in these terms without mentioning that an intervening cause is involved. Such opinions merely reason that while the defendant must foresee the harm, he is not required to foresee the exact manner in which the harm comes about.[35] Other jurisdictions use intervening cause terminology. This is a difference of characterization only and not of substance.

C. *Class of Persons*

Another limitation on the scope of liability is that the defendant must foresee a risk of harm to the class of persons to which the plaintiff belongs.[36] This limitation is often stated as an aspect of duty rather than proximate cause.[37] The degree to which this limitation will be accepted in negligence cases is as yet unsettled.[38] It is, however, a well established requirement in products liability cases.[39]

III. Strict Liability

Strict products liability cases employ all three types of limitations on liability. That is, courts commonly require the plaintiff, the type of harm, and the manner of harm to be foreseeable. Some courts may use all of these limits, while others may formally use only one or two. As we will see, there is such a close relationship between the three limits that there may be little practical difference in the scope of liability between a court that uses all three of these limitations and a court that uses only two of them.

A. *Type of Harm*

Some courts use foresight of harm as the criterion for limiting liability in strict product liability cases.[40] This foresight test is borrowed from neg-

35. McDowell v. Village of Preston, 104 Minn. 263, 116 N.W. 470 (1908).

36. Harper, *supra* note 10, at 1001-04; R. Keeton, *supra* note 1, at 79; W. Prosser & W. Keeton, *supra* note 19, at 284.

37. W. Prosser & W. Keeton, *supra* note 19, at 284.

38. H. Hart & A. Honore, *supra* note 1, at 245-48; W. Prosser & W. Keeton, *supra* note 19, at 285.

39. *See infra* notes 137-52 and accompanying text.

40. Note, *supra* note 15, at 721-22.

ligence law.[41] These cases impose liability where the harm is foreseeable,[42] but not where it is unforeseeable.[43] Thus, in *Oehler v. Davis,*[44] the defendant sold a dog collar ring which was defective because it contained a physical flaw.[45] The ring broke because of the defect, allowing a dog to escape. The dog escaped and injured the plaintiff through excessive playfulness. The court held that the defendant was not liable because the risk of harm through playfulness was unforeseeable. The defendant would have been liable if the plaintiff had been injured by a foreseeable risk, such as an attack by a vicious dog.

In strict liability cases "foreseeability" of risk is often used in a different sense than in negligence cases. A risk associated with a product could be unforeseeable for a variety of reasons. For example, ignorance of any of the following matters can render a risk unforeseeable: physical flaws in the product, generic risks associated with the product, product misuse, intervening causes, and the identity of persons affected by the product. In negligence cases ignorance of any of these matters is sufficient to exonerate the defendant if they cause the risk to be unforeseeable. In strict liability cases ignorance of some of these matters will exonerate the defendant, but ignorance of others

41. *Id.*

42. Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983) (strict liability is imposed only for foreseeable risks created by a design defect); Pust v. Union Supply Co., 38 Colo. App. 435, 561 P.2d 355 (1976), *aff'd*, 196 Colo. 162, 583 P.2d 276 (1978) (strict liability for failure to install guards on conveyor and failure to warn; proximate cause depends on whether it was foreseeable that worker would get his arm caught in an unguarded "nip point"); Payne v. Soft Sheen Prods., 486 A.2d 712 (D.C. 1985) (strict liability for failure to warn; duty to warn is limited to foreseeable risks, and the resulting injury must grow out of the foreseeable risk); Robinson v. Williamsen Idaho Equip. Co., 94 Idaho 819, 498 P.2d 1292 (1972) (breach of implied warranty gives rise to liability only for damages falling within the scope of the foreseeable risk created by the defective condition of the product); Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964 (1978) (under implied warranty the manufacturer must design against reasonably foreseeable risks arising in the environment in which the product can be expected to be used, but it does not have to design against bizarre, unforeseeable accidents); Tucci v. Bossert, 53 A.D.2d 291, 385 N.Y.S.2d 328 (1976) (strict liability and breach of warranty; manufacturer must warn against reasonably foreseeable risks, and he is liable for injuries arising from such risks); Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420, 424 (Tex. Civ. App. 1970) (manufacturer is strictly liable for a design defect which harmed plaintiff because "plaintiff's injury was a reasonably foreseeable risk of harm engendered by the intended use of the product").

43. Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 859-64 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968) (strict liability is not appropriate if the harm is unforeseeable); Oehler v. Davis, 223 Pa. Super. 333, 298 A.2d 895 (1972) (strict liability is not appropriate if the harm is unforeseeable).

44. 223 Pa. Super. 333, 298 A.2d 895 (1972).

45. *Id.* at 339, 298 A.2d at 899 (Cercone, J., dissenting) (the ring was defective because of improper casting and improper composition).

will not. This Article will discuss each of these matters in the context of the strict liability cause of action.

1. Physical Flaws and Generic Risks

The restricted sense in which "foreseeability" is used in strict product liability cases is clearly illustrated by cases involving unintended physical flaws. In *Oehler v. Davis,* for example, if the manufacturer of the dog collar ring had been justifiably ignorant of the flaw in his product he could not have "foreseen" any risk of harm, and therefore, would not have been negligent. His inability to discover the flaw, however, is not an excuse in a strict liability case.[46] Therefore, "foreseeability" of harm in strict liability cases involving manufacturing defects (products not in the condition that the manufacturer intended) is necessarily determined by imputing knowledge of the flaw to the hypothetical reasonable manufacturer and asking what kinds of accidents the defect is likely to cause.[47] Thus, an element of "hindsight" is used to determine which risks are "foreseeable," and in this respect the scope of liability is broader in strict liability cases than in negligence cases.

An injury can also be unforeseeable because of ignorance of a generic risk associated with a product, such as the side-effect of a drug. These are risks common to all products in the line.[48] Manufacturing defect cases are distinguishable in that only a small percentage of products in the line are defective because of unintended flaws or impurities.[49] If products containing generic risks are defective, it is because of the way they are designed or because of a failure to warn. Manufacturers must design products so as to minimize risks associated with products, and they must warn against non-obvious risks that cannot feasibly be eliminated. Some courts refuse to impute knowledge of scientifically unknowable risks to manufacturers in cases in-

46. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 36-37 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963); Feldman v. Lederle Laboratories, 97 N.J. 429, 450, 479 A.2d 374, 385 (1984); RESTATEMENT (SECOND) OF TORTS § 402A(2) comment a (1966).

47. *E.g.*, Feldman v. Lederle Laboratories, 97 N.J. 429, 450, 479 A.2d 374, 385 (1984):

> This difference between strict liability and negligence is commonly expressed by stating that in a strict liability analysis, the defendant is assumed to know of the dangerous propensity of the product, whereas in a negligence case, the plaintiff must prove that the defendant knew or should have known of the danger. . . . This distinction is particularly pertinent in a manufacturing defect context.

Id.

48. *See* Page, *Generic Product Risks: The Case Against Comment k and For Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 857 (1983).

49. *Id.*

volving products that allegedly are defective because of a failure to warn,[50] and others refuse to impute such knowledge in cases where the product is allegedly improperly designed.[51] In such jurisdictions the scope of liability is the same whether the case is brought on a negligence or a strict liability theory;[52] there is no liability for unforeseeable risks. Other courts impose a broader scope of liability in strict liability cases by imputing knowledge of the risk to the manufacturer.[53] In such jurisdictions foreseeability is used in the same restricted sense in design and warning cases as it is in manufacturing defect cases. That is, knowledge of the danger is imputed and proximate cause is determined by asking what kinds of accidents a reasonable manufacturer with such knowledge is likely to anticipate.

Like the negligence cases, strict liability cases also frequently characterize these issues as involving duty rather than proximate cause. For example, *Ferebee v. Chevron Chemical Co.*[54] used a duty analysis in a case involving the problem of an allegedly unforeseeable risk. The decedent was an agricultural worker who contracted pulmonary fibrosis from dermal exposure to paraquat. The strict liability action for his wrongful death was based on a failure to warn against permitting the chemical to come into contact with the skin. The defendant had notice that this exposure could cause pulmonary fibrosis that would lead to death almost immediately. It argued that the decedent's condition was unforeseeable because he contracted chronic, or long-term, pulmonary fibrosis which leads to death only after a prolonged illness.[55] The court rejected the defendant's characterization of the risk as overly narrow.[56] It held that the defendant breached its duty to warn that dermal exposure to paraquat could cause fatal lung disease.[57] The length of the illness was an unimportant detail that it did not have to foresee.[58] The court noted that there would be no duty to warn against "an unforeseeable and drastically different type of illness" such as "serious damage to other organs of the body."[59] Obviously the case could have just as easily been decided under a proximate cause rubric, i.e., failure to warn is a proximate cause of death from lung disease but is not a proximate cause of harm to another bodily organ.

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50. *E.g.*, Borel v. Fiberboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

51. *E.g.*, Jones v. Hutchinson Mfg., 502 S.W.2d 66 (Ky. Ct. App. 1973).

52. *Id.*

53. *E.g.*, Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974) (hindsight used in design and warning cases).

54. Ferebee v. Chevron Chem. Co., 552 F. Supp. 1293 (D.D.C. 1982).

55. *Id.* at 1299.

56. *Id.*

57. *Id.* at 1298-1300.

58. *Id.* at 1299.

59. *Id.* at 1300.

2. Misuse and Intervening Cause

Harm caused by a product also can be unforeseeable either because product misuse or an intervening cause is unforeseeable. For example, in *Dosier v. Wilcox & Crittendon Co.*,[60] a hook manufactured as a cattle tie was used to lift a 1700 pound weight. The hook broke, and the weight fell on the plaintiff's arm. Clearly, the type of harm in that case was foreseeable only if the use of the hook was foreseeable. Most courts impose liability in such cases only if the use or intervening cause involved was foreseeable.[61] The defendant in *Dosier*, for example, was held not liable on the basis of a jury finding that the use of the hook was unforeseeable. In cases of this kind, the requirement that the misuse or intervening cause be foreseeable is the functional equivalent of requiring the harm to be foreseeable. That is, no one could foresee the risk of a weight falling on the plaintiff unless they could foresee that someone would use the hook to lift the weight. In fact, the intended use doctrine, which is the forerunner of the foreseeable misuse doctrine,[62] arose in negligence cases as a convenient way of expressing the foreseeability requirement.[63]

The distinction between misuse and intervening cause is merely a matter of terminology. An intervening cause is an actively operating force that comes on the scene after the defendant's tortious conduct has taken place.[64] If the relevant intervening act is done by the user of the product, courts often label the conduct as misuse[65] rather than as an intervening cause, but the effect is clearly the same regardless of the label.[66] Both intervening causes and acts of misuse are judged by the same foreseeability standard.[67]

A great many products liability cases involve either misuse or intervening causes.[68] It is theoretically possible for an unexpected result to occur because

60. Dosier v. Wilcox & Crittendon Co., 45 Cal. App. 3d 74, 119 Cal. Rptr. 135 (1975).

61. Keeton, *Products Liability and Defenses — Intervening Misconduct*, 15 FORUM 109, 112-13 (1979).

62. Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447, 455-56 (1978).

63. Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83 (9th Cir. 1962); Otis Elevator Co. v. Wood, 436 S.W.2d 324, 328 (Tex. 1968).

64. *See supra* notes 26-30 and accompanying text.

65. *E.g.*, Baker v. International Harvester Co., 660 S.W.2d 21 (Mo. Ct. App. 1983).

66. Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 331 n.13, 319 A.2d 914, 920 n.13 (1974) (intervening cause and abnormal use are equivalent); Pegg v. General Motors Corp., 258 Pa. Super. 59, 78, 391 A.2d 1074, 1083 (1978).

67. *E.g.*, Dugan v. Sears, Roebuck & Co., 113 Ill. App. 3d 740, 744-44a, 447 N.E.2d 1055, 1057-58 (1983); Pegg v. General Motors Corp., 258 Pa. Super. 59, 78, 391 A.2d 1074, 1083 (1978); Keeton, *supra* note 61, at 112-13.

68. Leistra v. Bucyrus-Erie Co., 443 F.2d 157 (8th Cir. 1971).

of an unknown preexisting condition rather than an intervening cause. The famous *Polemis case* discussed previously[69] is an example of such a case in a non-products liability context. That was the case where the falling plank caused a spark which ignited the gasoline fumes in the hold of a ship. Such cases arise infrequently in the products liability context. The defendant's tortious conduct must be complete when the product leaves his hands because the law requires the product to be defective at that time.[70] Accidents cannot happen unless someone subsequently acts, and these acts are intervening causes. Liability frequently turns on whether these acts cut off the manufacturer's liability.

There is one common type of case that is analogous to *Polemis.* This is where the user of a product suffers harm because of an idiosyncratic or allergic reaction to the product. Here the only intervening cause is the plaintiff's consumption or use of the product, and this is a foreseeable use. If the harm is unforeseeable, it is because the manufacturer is ignorant of an unknown preexisting condition, the plaintiff's unusual susceptibility. This situation is reminiscent of the "thin skull" rule,[71] which is really an application of the *Polemis* rule. This rule holds the defendant liable for the consequences of his negligence even if it is more serious than expected because the plaintiff suffers from an infirmity unknown to the defendant.

Courts have not applied the *Polemis* rule in the idiosyncratic or allergic reaction cases. They require that the reaction be foreseeable.[72] Some courts are even more restrictive in that they require that there be a substantial number of people affected.[73] The explanation for this may be that the *Polemis* rule of proximate cause comes into play only after the plaintiff has shown tortious conduct, i.e., a negligent act. In the idiosyncratic reaction cases there is no tortious conduct unless the defendant has a duty to protect the idiosyncratic user. The limitations imposed are necessary to establish this breach of duty.[74]

Requiring that the intervening cause or misuse be foreseeable is a major limitation on the scope of liability. It restricts the scope of liability in one of several ways discussed in the following sections. For purposes of this analysis intervening causes will be placed in one of two categories, those that create harmful consequences resulting from use of non-defective products

69. *See supra* note 24 and accompanying text.

70. RESTATEMENT (SECOND) OF TORTS § 402A(1) comment g (1966). Cases imposing a post-sale duty to warn about subsequently discovered risks are an exception. *E.g.,* Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959).

71. McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911).

72. *E.g.,* Wright v. Carter Prods., 244 F.2d 53 (2d Cir. 1957).

73. *E.g.,* Kaempfe v. Lehn & Fink Prods. Corp., 21 A.D.2d 197, 249 N.Y.S.2d 840 (1964), *aff'd mem.,* 20 N.Y.2d 818, 231 N.E.2d 294, 284 N.Y.S.2d 708 (1967).

74. Note, *Strict Liability for Product Marketing: Misrepresentation and Duty to Warn,* 12 HOUS. L. REV. 469, 473-74 (1975).

and those that create harmful consequences resulting from use of defective products.

a. Non-Defective Products

One way that the foreseeability requirement can restrict the scope of liability is by precluding a finding that a harm-producing product is defective. Manufacturers have a duty to design products that are reasonably safe in light of anticipated misuse and intervening causes. If the misuse or intervening cause is foreseeable, the product is defective if the design does not minimize the risk.[75] Thus, cars must be designed to be reasonably safe when involved in collisions,[76] industrial machinery must have adequate safety guards,[77] and products must be made of materials which minimize the risk of harm resulting from foreseeable misuse and intervening causes.[78] When it is not feasible to eliminate the risk through design changes, manufacturers must warn about the dangers involved in foreseeable misuse.[79] On the other hand, where the misuse or intervening cause which produced the harm was unforeseeable, the product may not be defective at all.[80]

Obviously, cases in this category can readily be analyzed either in terms of defect or intervening cause. In the case involving the cattle tie used to lift the 1700 pound weight,[81] for example, a court could analyze the case by stating that the product was not defective because it was reasonably safe for

75. Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 420 (1978).

76. McGee v. Cessna Aircraft Co., 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978); Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974); Friend v. General Motors Corp., 118 Ga. App. 763, 165 S.E.2d 734 (1968), *cert. dismissed*, 225 Ga. 290, 167 S.E.2d 926 (1969); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973).

77. Byrnes v. Economic Mach. Co., 41 Mich. App. 192, 200 N.W.2d 104 (1972); Reid v. Spadone Mach. Co., 119 N.H. 457, 404 A.2d 1094 (1979); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972).

78. D'Hedouville v. Pioneer Hotel Co., 552 F.2d 886 (9th Cir. 1977) (carpet made of flammable fibers); La Gorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967), *aff'd*, 407 F.2d 671 (3d Cir. 1969) (child's jacket defective because not treated with flame retardant).

79. Robinson v. Williamsen Idaho Equip. Co., 94 Idaho 819, 498 P.2d 1292 (1972); Smith v. United States Gypsum Co., 612 P.2d 251 (Okla. 1980); Anderson v. Klix Chem. Co., 256 Or. 199, 472 P.2d 806 (1970); Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387 (Tex. Civ. App. 1968).

80. Dosier v. Wilcox & Crittendon Co., 45 Cal. App. 3d 74, 119 Cal. Rptr. 135 (1975); *see also* Barr v. Rivinius, Inc., 58 Ill. App. 3d 121, 373 N.E.2d 1063 (1978).

81. Dosier v. Wilcox & Crittendon Co., 45 Cal. App. 3d 74, 119 Cal. Rptr. 135 (1975). For a discussion of this case, see *supra* notes 60-63 and accompanying text.

its foreseeable use. Alternatively, the court could state that there is no liability because the accident was caused by unforeseeable misuse (use of the tie to lift a heavy weight) or by an unforeseeable intervening cause (use of the tie to lift a heavy weight). In cases of this sort the terminology used does not affect the outcome.

The important point is that, where intervening causes are concerned, courts use foresight to determine the scope of liability. In such cases the scope of liability is narrower than in some other situations where harm is unforeseeable, e.g., sale of a product with an undiscoverable manufacturing flaw. A later section of this Article analyzes why it may be appropriate to use foresight in intervening cause cases but not in other cases.[82]

While foreseeability of use or intervening cause is relevant to determining defectiveness, it is not always controlling. Some products are not defective even though the use or intervening cause which produced the harm was foreseeable. This is because manufacturers are not required to produce products that are absolutely accident proof. This is true under both the risk-utility test of defect and the consumer expectations test. Under the former test, a potentially dangerous product is not defective if it is reasonably safe. Under the latter test, such products are not defective if the danger is known or obvious.[83]

Two Massachusetts cases conveniently illustrate the point because that state has used both consumer expectations and risk-utility in determining whether a product is defective in design.[84] Massachusetts imposes liability under an implied warranty theory rather than a strict tort theory, but its theory is "congruent in nearly all respects" with section 402A of the Restatement (Second) of Torts.[85] In *Killeen v. Harmon Grain Products, Inc.*,[86] a ten year old child fell from a jungle gym while sucking on a toothpick with a sharp point, and the toothpick punctured her lip. The court dismissed the action against the manufacturer notwithstanding that the injury was foreseeable because the danger posed by the product was both reasonable and obvious.[87] In *Venezia v. Miller Brewing Co.*,[88] an eight year old child threw an empty beer bottle against a telephone pole.[89] It broke, and the child's eye was injured by particles of shattered glass. The plaintiff argued that the manufacturer should have designed a more durable bottle because such use

82. *See infra* notes 200-04 and accompanying text.

83. For a fuller discussion of these tests of defect, see *infra* notes 172-90 and accompanying text.

84. Back v. Wickes Corp., 375 Mass. 633, 642, 378 N.E.2d 964, 970 (1978).

85. *Id.* at 640, 378 N.E.2d at 969.

86. Killeen v. Harmon Grain Prods., 11 Mass. App. 20, 413 N.E.2d 767 (1980).

87. *Id.* at 23, 413 N.E.2d at 770.

88. Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980).

89. *Id.* at 189, 191.

was foreseeable.[90] The court dismissed the claim against the manufacturer because the bottle was not defective, even if such use were foreseeable, because it was reasonably fit and the danger was obvious.[91] In analogous cases other courts have also declined to impose liability even though the use or intervening cause was foreseeable.[92]

A line of authority applies this rationale to harm caused by otherwise safe products which are foreseeably modified by users in such a way as to make them dangerous. These courts hold that such products are not defective either for a failure to warn[93] or for a failure to build in safety features which would make the product safe to use after modification.[94] Other courts reject this rationale and impose liability if the modification was foreseeable.[95]

b. Defective Products

Intervening cause or misuse can restrict the scope of liability in a second class of cases. This is where the product is independently defective, but an unforeseeable intervening cause produces a different type of harm than was foreseeable. Suppose a car has a defective trunk that will not stay closed. This creates a foreseeable risk that the trunk lid will fly open while the car is being driven and cause an accident by obstructing the driver's vision. Instead of this occurring, the driver is hit by another car as he is standing in the street behind his car, trying to close the trunk lid. Here the intervening

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90. *Id.* at 189.

91. *Id.* at 190-92.

92. Delk v. Holiday Inns, Inc., 545 F. Supp. 969 (S.D. Ohio 1982) (strict liability; carpet manufacturer not required to guard against foreseeable arson); Kellar v. Inductotherm Corp., 498 F. Supp. 172 (E.D. Tenn. 1978), *aff'd without opinion*, 633 F.2d 216 (6th Cir. 1980) (strict liability; component part not designed to prevent foreseeable risk created by purchaser); Landrine v. Mego Corp., 95 A.D.2d 759, 464 N.Y.S.2d 516 (1983) (strict liability, warranty, negligence; balloon not defective because of risk that child could swallow it); May v. Dafoe, 25 Wash. App. 575, 611 P.2d 1275 (1980) (strict liability; medical device not defective for failure to warn physicians about the proper use of the device in view of current medical research).

93. *E.g.*, Talley v. City Tank Corp., 158 Ga. App. 130, 138, 279 S.E.2d 264, 271 (1981) (strict liability); Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975) (negligence); Hill v. G.M. Corp., 637 S.W.2d 382 (Mo. Ct. App. 1982) (negligence).

94. *E.g.*, Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975) (negligence); Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980) (strict liability, negligence).

95. Whitehead v. St. Joe Lead Co., 729 F.2d 238, 250 (3d Cir. 1984) (strict liability, warranty; New Jersey law); Beloit Corp. v. Harrell, 339 So. 2d 992 (Ala. 1976) (negligence; design); Soler v. Castmaster, 98 N.J. 137, 484 A.2d 1225 (1984) (strict liability; design); Anderson v. Klix Chem. Co., 256 Or. 199, 472 P.2d 806 (1970) (strict liability; warning); D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. 120, 310 A.2d 307 (1973) (strict liability, warranty, negligence).

cause, the negligence of the other driver, cuts off the liability of the car manufacturer because it produces a different kind of accident than the manufacturer could foresee.[96]

In cases of this kind, where a defective product produces an unforeseeable type of harm because of an intervening cause, proximate cause and intervening cause analyses are interchangeable. A court can use a proximate cause analysis without even mentioning that an intervening cause is present. Such cases merely state that the issue is one of proximate cause, and this turns on the question of foreseeability.[97] Other cases analyze the problem as one of intervening cause, the result likewise turning on the question of foreseeability.[98] Some courts use both forms of analysis.[99]

There is an additional type of case involving defective products where the intervening cause doctrine restricts the scope of liability. These are cases where a product is defective because it creates a risk of a particular type of harm, and that very type of harm comes about through the operation of an unforeseeable intervening cause. Here, the type of harm is foreseeable, but the manner of harm is not. The degree to which unforeseeability of manner of harm restricts the scope of liability is discussed in a later section of this Article.[100]

3. Foreseeability of Harm Rejected

In selected situations some courts refuse to impose liability on manufacturers whose products create foreseeable risks of harm. This Article has already discussed one class of such cases, those where the product is not defective even though the use or intervening cause was foreseeable.[101] Another class of cases impose across the board limitations on liability without regard to foreseeability of risk. Some courts, for example, refuse to impose liability for pure mental distress[102] or pure pecuniary loss[103] in the absence of physical

96. *See* Ventricelli v. Kinney System Rent A Car, Inc., 45 N.Y.2d 950, 383 N.E.2d 1149, 411 N.Y.S.2d 555, *modified mem.*, 46 N.Y.2d 770, 386 N.E.2d 263, 413 N.Y.S.2d 655 (1978); Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 317, 414 N.E.2d 166, 171, 434 N.Y.S.2d 166, 170 (1980) (citing *Ventricelli* as an example of a case exonerating defendant because both the type of harm and the intervening cause were unforeseeable); *see also* Mull v. Ford Motor Co., 368 F.2d 713, 717 (2d Cir. 1966).

97. *E.g.*, Oehler v. Davis, 223 Pa. Super. 333, 298 A.2d 895 (1972).

98. *E.g.*, Mull v. Ford Motor Co., 368 F.2d 713, 717 (2d Cir. 1966).

99. *E.g.*, Schreffler v. Birdsboro Corp., 490 F.2d 1148, 1154 (3d Cir. 1974).

100. *See infra* notes 123-36 and accompanying text.

101. *See supra* notes 83-95 and accompanying text.

102. *E.g.*, Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977) (strict liability); Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983) (negligence).

103. *E.g.*, Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc., 136 Ariz.

harm.[104] Another example are the early cases, now largely superseded,[105] declining to require automobiles to be crashworthy.[106] Cases of this kind represent a departure from the general approach of imposing liability for foreseeable harm.

Some courts reject foreseeability of harm as a limitation in all strict liability cases.[107] That is, they say that inability to foresee harm is no excuse in strict liability cases. Superficially, such courts appear to extend the scope of liability farther than do courts which require foreseeability of risk. In reality, in most cases, they do not because they require foresight of other factors[108] which usually constitute the functional equivalent of foresight of harm.

The New Jersey cases illustrate the point. New Jersey does not require foreseeability of harm,[109] but it does require that the plaintiff,[110] the misuse,[111] and the intervening cause[112] be foreseeable. When these are foreseeable, however, the harm will nearly always be foreseeable unless the product possesses an unknown physical flaw or an unknown generic risk.[113] New Jersey apparently requires foresight of harm in many generic risk cases other than

444, 666 P.2d 544 (Ct. App. 1983) (strict liability, negligence); Waggoner Equip. & Excavating Co. v. Clark Equip. Co., 668 S.W.2d 601 (Mo. Ct. App. 1984) (strict liability, negligence). *Contra* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (strict liability); Berg v. G.M. Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976) (negligence).

104. Hales v. Green Colonial, Inc., 490 F.2d 1015 (8th Cir. 1974) (strict liability; where a defective product causes physical harm, plaintiff can recover economic losses in addition to damages for physical harm).

105. Most courts require cars to be designed reasonably safe in the event of a collision. *See, e.g.*, cases cited *supra* note 76.

106. *E.g.*, Landrum v. Massey-Ferguson, Inc., 473 F.2d 543 (5th Cir. 1973) (strict liability).

107. Eshbach v. W.T. Grant's & Co., 481 F.2d 940 (3d Cir. 1973); Baker v. International Harvester Co., 660 S.W.2d 21 (Mo. Ct. App. 1983); Brown v. United States Stove Co., 98 N.J. 155, 484 A.2d 1234 (1984); Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 564 P.2d 674 (1977).

108. Eshbach v. W.T. Grant's & Co., 481 F.2d 940 (3d Cir. 1973) (misuse); Baker v. International Harvester Co., 660 S.W.2d 21 (Mo. Ct. App. 1983) (misuse); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979) (misuse); Torsiello v. Whitehall Laboratories, 165 N.J. Super. 311, 398 A.2d 132 (1979) (intervening cause); Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971) (plaintiff); Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 564 P.2d 674 (1977) (misuse).

109. Brown v. United States Stove Co., 98 N.J. 155, 166, 484 A.2d 1234, 1240 (1984).

110. Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971).

111. Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

112. Torsiello v. Whitehall Laboratories, 165 N.J. Super. 311, 398 A.2d 132 (1979).

113. *See supra* notes 40-100 and accompanying text.

those involving asbestos, but the exact degree to which foresight is required in such cases is unclear under present law.[114] Therefore, cases with unknown physical flaws represent the major body of New Jersey cases imposing liability where the harm is not foreseeable.[115] The results in the New Jersey cases are consistent with those reached by courts which generally require foreseeability of harm because those courts also do not require that physical flaws be discoverable with the exercise of reasonable care.[116]

Actually, foreseeability of use and intervening cause can be a more restrictive test of proximate cause than foreseeability of harm. A court employing the former requirements will in effect require foreseeability of the manner of harm as well as the type of harm. A court employing the latter test will impose liability where the type of harm is foreseeable even if the manner of harm is unforeseeable. The next section of this Article analyzes the cases requiring that the manner of harm be foreseeable.

There is one final sense in which some courts reject foreseeability. With respect to intervening causes, they use hindsight rather than foresight to determine whether an intervening cause is "foreseeable."[117] In essence, they look at the situation retrospectively and rule that the intervening cause is unforeseeable if the sequence of events giving rise to the accident appeared extraordinary.[118] In theory, this ought to extend the scope of liability much further than prospective foresight. Actually, there may be little practical difference between the two methods. The concept of foreseeability is so flexible that a court choosing to apply the concept broadly can find almost anything foreseeable.[119] Likewise, courts can use hindsight to achieve conservative results.[120] The flexibility of the foreseeability concept, and the degree

114. Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (foreseeability required in drug case); Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982) (foresight not required in asbestos case).

115. Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984).

116. *See supra* notes 46-52 and accompanying text.

117. Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975); Eshbach v. W.T. Grant's & Co., 481 F.2d 940 (3d Cir. 1973); Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 360 N.E.2d 440 (1977); Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978).

118. Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 861 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975); Eshbach v. W.T. Grant's & Co., 481 F.2d 940, 945 (3d Cir. 1973); Young v. Tide Craft, Inc., 270 S.C. 453, 465-66, 242 S.E.2d 671, 677 (1978).

119. Venezia v. Miller Brewing Co., 626 F.2d 188, 191 (1st Cir. 1980); Caputzal v. Lindsay Co., 48 N.J. 69, 75-76, 222 A.2d 513, 516 (1966).

120. *Compare* McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 181 N.E.2d 430, 226 N.Y.S.2d 407 (1962) (using foresight, court finds that negligence with full realization of the risk is unforeseeable) *with* Young v. Tide Craft, Inc., 270 S.C. 453, 465, 242 S.E.2d 671, 677 (1978) (using hindsight, court finds that negligence with full realization of the risk is unforeseeable).

to which it can be manipulated is discussed elsewhere in this Article.[121] The point is that the formulation of the test, whether a court evaluates the risk retrospectively or prospectively, is less important than the court's attitude about the scope of liability.[122]

B. *Manner of Harm*

This Article previously pointed out that some negligence cases recognize an exception to the rule that intervening causes must be foreseeable.[123] These cases impose liability when an unforeseeable intervening cause brings about the very harm that was foreseeable. The extent to which this exception applies to product liability cases is unsettled.

The question of whether the exception applies is important because it has a significant impact on the scope of liability. A court that invariably requires foreseeability of use and intervening cause, in effect, requires foreseeability of both type of harm and manner of harm. It requires foresight of type of harm because, as a practical matter, when the intervening cause and the use are foreseeable, the type of harm will almost always be foreseeable.[124] It requires foresight of manner of harm as well because the misuse and intervening cause must be foreseeable. This latter requirement restricts the scope of liability in cases where a foreseeable harm comes about as a result of an unforeseeable intervening cause or misuse. In these cases, the inability to anticipate the intervening cause or misuse means that there is no liability even though the type of harm was foreseen. A jurisdiction which required foreseeability of type of harm only would impose liability in such a case.

Moran v. Faberge, Inc.,[125] is an illustration. A cologne manufacturer negligently failed to warn that its product was highly flammable. The warning was required because of the risk that a user would cause a fire by bringing the cologne near a flame, as by holding a lighted match near an open bottle or by accidentally spilling the cologne near a lighted candle.[126] A fire started when a child deliberately splashed the cologne on the base of a lighted candle in order to make the candle scented. The court imposed liability for harm caused by the resulting fire without regard to whether the conduct of the child was foreseeable because that conduct brought about a foreseeable result, a fire.[127] Obviously, a court which required the intervening cause to be foreseeable would have decided the case differently.

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121. *See infra* notes 163-71, 208-13 and accompanying text.
122. R. KEETON, *supra* note 1, at 49.
123. *See supra* notes 33-34 and accompanying text.
124. *See supra* notes 107-16 and accompanying text.
125. Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975).
126. *Id.* at 554, 332 A.2d at 20.
127. *Id.*

Dyer v. Best Pharmacal,[128] illustrates the other approach. The defendant manufactured a drug which it recommended for many uses, one of which was as an anorexiant, but it warned against administering the drug to people with hypertension. The plaintiff's doctor administered the drug to her even though the plaintiff had hypertension, and she suffered injuries as a result. The plaintiff's evidence was that she told the doctor that she had hypertension. The doctor's evidence was that the plaintiff concealed this information. The plaintiff also had evidence showing that the drug was unsafe for use as an anorexiant for any person regardless of whether he had hypertension. The court held that the drug manufacturer could not be liable because, under either version of the facts, the intervening cause was unforeseeable as a matter of law.[129] Under the doctor's version the intervening cause was the patient's concealment of her condition, and under the plaintiff's version the intervening cause was the doctor's disregard of the warning. By requiring that the intervening cause be foreseeable, the court effectively required foreseeability of the manner of harm. The decision is not based on any requirement that the plaintiff suffer harm that was in any way different from what might be expected to occur to a non-hypertensive patient.

There is a split of authority on the question of whether the manner of harm must be foreseeable in products liability cases. A number of negligence[130] and strict liability[131] cases are in accord with *Moran*, and do not require that the manner of harm be foreseeable as long as the harm itself is foreseeable. Other negligence and strict liability cases require foreseeability of manner of harm.[132] Courts are especially inclined to require that the manner of harm (the intervening cause) be foreseeable in cases involving a conscious intervening agency. These are cases where a third party discovers the defect and either uses the product himself or passes it on to others without a warning.[133]

128. Dyer v. Best Pharmacal, 118 Ariz. 465, 577 P.2d 1084 (Ct. App. 1978).

129. *Id.* at 469, 577 P.2d at 1088.

130. Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983); Noonan v. Buick Co., 211 So. 2d 54 (Fla. Dist. Ct. App.), *cert. denied*, 219 So. 2d 698 (Fla. 1968); American Laundry Mach. Indus. v. Horan, 45 Md. App. 97, 412 A.2d 407 (1980); Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958); Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 205 N.W.2d 523 (1973); Ventricelli v. Kinney System Rent A Car, Inc., 59 A.D.2d 869, 399 N.Y.S.2d 237 (1977), *aff'd*, 45 N.Y.2d 950, 383 N.E.2d 1149, 411 N.Y.S.2d 555 (1978), *modified mem.*, 46 N.Y.2d 770, 386 N.E.2d 263, 413 N.Y.S.2d 655 (1978).

131. Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983); Pust v. Union Supply Co., 38 Colo. App. 435, 561 P.2d 355 (1976), *aff'd*, 196 Colo. 162, 583 P.2d 276 (1978); Tucci v. Bossert, 53 A.D.2d 291, 385 N.Y.S.2d 328 (1976).

132. Dyer v. Best Pharmacal, 118 Ariz. 465, 577 P.2d 1084 (Ct. App. 1978) (strict liability, negligence); Mohrdieck v. Village of Morton Grove, 94 Ill. App. 3d 1021, 419 N.E.2d 517 (1981) (negligence); Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971) (negligence, strict liability).

133. *E.g.*, Peck v. Ford Motor Co., 603 F.2d 1240 (7th Cir. 1979) (strict

The policy considerations underlying the choice between these two approaches are discussed in a later section of this Article.[134]

Even courts requiring foreseeability of manner of harm vary considerably concerning how much detail must be foreseeable. In *De Santis v. Parker Feeders, Inc.*,[135] a six year old child was injured when he fell into the exposed blades of a cattle feed auger as he attempted to step over it. The auger was allegedly defective for failure to warn about the necessity of installing a blade guard. The child and his friends were playing with squirt guns at the time of the accident. They had turned the auger on with a pitchfork. The court held that the manufacturer would be liable if it could foresee that children would use the machine and that a user would attempt to step over the auger while it was operating. It rejected the argument that defendant must also foresee how the machine was turned on and that the children were playing with squirt guns. The court ruled that these matters were irrelevant because the machine was operating in the same manner and involved the same risk as it would if it were being used to transport feed. The net effect is that the court required the manufacturer to foresee the manner of harm to some extent (that a user would attempt to step over the auger while it was operating), but it did not require it to anticipate all the details. Some courts would probably require foreseeability of these details, and thus deny plaintiff's claim, because of a reluctance to hold manufacturers of dangerous equipment responsible for the safety of children who play with it.[136]

C. *Class of Persons*

In a line of authority that is closely analogous to the famous *Palsgraf* case,[137] strict products liability cases generally limit recovery to foreseeable plaintiffs. The leading case is *Winnett v. Winnett*.[138] A four year old child was injured when she got her fingers caught in the holes of a moving conveyor belt on a forage wagon. The court held that the plaintiff could not recover because it was unforeseeable that she would be permitted to approach the

liability); Mull v. Ford Motor Co., 368 F.2d 713 (2d Cir. 1966) (negligence, implied warranty); Conder v. Hull Lift Truck, Inc., 435 N.E.2d 10 (Ind. 1982) (strict liability, negligence).

134. *See infra* section IV of text.

135. DeSantis v. Parker Feeders, Inc., 547 F.2d 357 (7th Cir. 1976).

136. For a discussion of this problem, see Richelman v. Kewanee Mach. & Conveyor Co., 59 Ill. App. 3d 578, 581-83, 375 N.E.2d 885, 887-88 (1978); *see also* Wenzell v. MTD Prods., 32 Ill. App. 3d 279, 336 N.E.2d 125 (1975) (unforeseeable that a seven year old child would be permitted to operate a riding lawn mower in the presence of other children); *cf.* Hays v. Western Auto Supply Co., 405 S.W.2d 877, 884 (Mo. 1966) (unforeseeable that an eight year old operator of a riding lawn mower will back into an infant, knock him down and run over him).

137. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

138. Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974).

equipment while it was operating and place her hands on the moving conveyor.

In its inception, strict products liability only extended to users or consumers of defective products.[139] Later, courts expanded the scope of liability by permitting bystanders to recover.[140] The distinction between these various classes of persons is now of little practical importance because the basic test of liability is the same regardless of the classification.[141] Both users and consumers[142] and bystanders[143] can recover only if the manufacturer can foresee that they will be injured by the defective product.

Some parties cannot readily be classified as either users, consumers or bystanders. Cases involving rescuers are an example. One approach to cases of this kind is to apply the same foreseeability test that is used with other classes of plaintiffs.[144] Other courts decide these cases under hard and fast rules. New York, for example, permits rescuers to recover even if they are unforeseeable.[145] Missouri grants recovery to rescuers of persons but denies recovery to rescuers of property.[146]

Courts are particularly inclined to apply hard and fast rules where third parties suffer mental distress resulting from concern about a person injured

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139. RESTATEMENT (SECOND) OF TORTS § 402A (1966).

140. *E.g.*, Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

141. Winnett v. Winnett, 57 Ill. 2d 7, 11, 310 N.E.2d 1, 4 (1974).

142. DeSantis v. Parker Feeders, Inc., 547 F.2d 357 (7th Cir. 1976); Helene Curtis Indus. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); Klimas v. International Tel. & Tel. Corp., 297 F. Supp. 937 (D.R.I. 1969); Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963).

143. Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965); Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974); Barr v. Rivinius, Inc., 58 Ill. App. 3d 121, 373 N.E.2d 1063 (1978); Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 357 N.E.2d 738 (1977); Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 342 N.E.2d 908, *modified on petition for reh'g*, 168 Ind. App. 383, 348 N.E.2d 654 (1976); Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703 (Ky. 1975); Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971). *Contra* Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

144. Court v. Grzelinski, 72 Ill. 2d 141, 379 N.E.2d 281 (1978) (fireman injured in attempt to put out fire caused by a defective product can recover if jury finds him foreseeable); Bobka v. Cook County Hosp., 97 Ill. App. 3d 351, 422 N.E.2d 999 (1981) (sister who donated skin to brother injured by defective product could not recover because she was not foreseeable).

145. Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969) (breach of warranty) (citing with approval Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921)).

146. Welch v. Hesston Corp., 540 S.W.2d 127 (Mo. Ct. App. 1976).

by a defective product.[147] New York denies recovery in all such cases.[148] Other courts permit recovery, but impose special restrictions in such actions. In *Saxton v. McDonnell Douglas Aircraft Co.*,[149] for example, the court applied the factors in *Dillon v. Legg*,[150] a negligence case. The factors require that 1) the parties be closely related, 2) the plaintiff be sufficiently near the scene of the accident, and 3) the plaintiff contemporaneously observe the accident. *Saxton* was a strict liability action brought for the wrongful death of a woman whose son was killed in an aircraft accident. Prior to her death, she sued the manufacturer of the plane for wrongful death of her son and recovered a judgment. Subsequently, she became despondent and committed suicide. The court denied recovery for the suicide because she was deemed unforeseeable since she did not meet the *Dillon v. Legg* factors. Other courts have applied similar factors to permit recovery.[151] While courts talk in terms of foreseeability in these mental distress cases, it is clear that the criteria adopted restrict the scope of liability far short of that which is factually foreseeable.[152] There is an obvious risk that a typical parent will suffer severe mental distress upon hearing of the death of his child regardless of his proximity to the scene of the accident or even whether he witnessed the accident at all.

Relationship to Type of Harm and Manner of Harm

There is a very close relationship between the requirement that plaintiff fall within a foreseeable class of persons and other proximate cause rules discussed previously. Frequently, the plaintiff is unforeseeable only because the type of harm or manner of harm, or both, are unforeseeable. An understanding of this relationship is particularly useful in jurisdictions requiring that the plaintiff be foreseeable, but rejecting foreseeability of either type of harm or manner of harm. In such situations, a defendant can seek to achieve the same result by using the alternative characterization that the plaintiff was unforeseeable.

147. *See generally* Note, *Emotional Distress in Products Liability: Distinguishing Users from Bystanders*, 50 FORDHAM L. REV. 291 (1981); Note, *The Merger of Emotional Distress and Strict Liability in Tort*, 19 NEW ENG. L. REV. 403 (1983-1984).

148. Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

149. Saxton v. McDonnell Douglas Aircraft Co., 428 F. Supp. 1047 (C.D. Cal. 1977).

150. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc).

151. Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977) (strict liability, warranty); Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa 1982) (strict liability, warranty); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982) (negligence).

152. *See* Fischer, *Tort Law: Expanding the Scope of Recovery Without Loss of Jury Control*, 11 HOFSTRA L. REV. 937, 944-48 (1983).

In a very large percentage of cases the plaintiff is foreseeable only because the type of harm is foreseeable.[153] The *Palsgraf* case is an example of this. Mrs. Palsgraf was a bystander on a railroad platform. Some distance away a conductor knocked a package out of a passenger's hand. Although the conductor did not know it, the package contained fireworks. They exploded upon impact with the ground, and the explosion allegedly knocked a large scale onto Mrs. Palsgraf. The court held that the railroad was not liable to Mrs. Palsgraf because any negligence on the part of the conductor did not create a foreseeable risk to her. Clearly, the reason Mrs. Palsgraf was unforeseeable was because the type of harm was unforeseeable. If the conductor had known that the package contained explosives, he would have realized that his conduct created a risk of harm to other people in the area.

Many products liability cases fall into this pattern. A fireman, injured in the course of putting out a fire caused by a defective product, is a foreseeable plaintiff only if the defect creates a risk of fire or explosion.[154] Likewise, a bystander is a foreseeable victim of a defective product only if the defect poses the risk of creating the kind of accident that can harm a bystander. Examples include vehicles containing defects which impair the operator's view of the road[155] or create the risk of loss of control.[156] Vehicles not containing such defects do not foreseeably jeopardize bystanders.[157] In such cases the plaintiff is unforeseeable because the type of harm is unforeseeable.

Inability to foresee manner of harm is also sometimes an alternative characterization. *Barr v. Rivinius, Inc.*[158] provides a good illustration of the relationship between class of persons, type of harm, and manner of harm. In that case an operator of a piece of heavy equipment, moving one mile per hour, ran down a person standing in front of his machine. Although he had a full view of the road, the operator hit the plaintiff because he was not looking where he was driving. The plaintiff alleged that the machine was defective because the front wheels were improperly guarded or shielded. The court held that the plaintiff was not reasonably foreseeable.[159] The basis of the holding was that the occurrence was unforeseeable; that is, the manufacturer was not required to anticipate that the operator in full control of a machine traveling one mile per hour would run down a pedestrian in full view.[160]

153. R. KEETON, *supra* note 1, at 85.
154. *See* Court v. Grzelinski, 72 Ill. 2d 141, 379 N.E.2d 281 (1978).
155. Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 357 N.E.2d 738 (1977).
156. Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971).
157. *See* Barr v. Rivinius, Inc., 58 Ill. App. 3d 121, 373 N.E.2d 1063 (1978).
158. *Id.*
159. *Id.* at 126-27, 373 N.E.2d at 1066-67.
160. *Id.* at 127, 373 N.E.2d at 1067.

There are two alternative bases for the holding that the plaintiff was unforeseeable. One is that the misuse (driver's conduct) or intervening cause (plaintiff's conduct) was unforeseeable.[161] Depending on the facts of the case, this could amount to a finding that the manner of harm was unforeseeable. Suppose that in *Barr v. Rivinius* the guard or shield was reasonably necessary to prevent a different type of accident. Assume that a worker is required to stand on the front of the moving machine, and there is a risk that he will fall off and be run over. Under these circumstances, if the type of accident that occurred in *Barr* were to happen, a court could not find that the type of harm (being run over by the wheel) was unforeseeable. Its finding that the misuse or intervening cause was unforeseeable amounts to a finding that the manner of harm was unforeseeable. Thus, the alternative basis of the decision, that the plaintiff was unforeseeable, is the equivalent of a holding that the manner of harm was unforeseeable. Under these circumstances the plaintiff would be unforeseeable only because the manner of harm was unforeseeable.

The second alternative basis for the holding in *Barr v. Rivinius*, that the plaintiff was unforeseeable, is that there was no proximate cause because the type of harm was unforeseeable. This alternative is based on the assumption that no accident resulting from the absence of a guard or shield is foreseeable. In such cases a court may sometimes have an additional alternative basis of decision. This is to find that the product was not defective. The relationship between defect and proximate cause is discussed elsewhere in this Article.[162]

In some cases inability to foresee the plaintiff does not prevent either type of harm or manner of harm from being foreseeable. *DeSantis v. Parker*,[163] discussed previously, illustrates this. That was the case where the child fell into a feed auger while stepping over it. The court required that both the use (stepping over the auger) and the plaintiff (a child) be foreseeable. In that case, a jury could find that the use was foreseeable without finding that the plaintiff was foreseeable. In the event of such a finding, both type of harm and manner of harm (falling into the auger) would be foreseeable without regard to whether the plaintiff was foreseeable. In cases of this kind, foreseeability of the plaintiff is more than an alternative characterization for these other proximate cause doctrines.

This naturally raises the question of why inability to foresee the plaintiff should cut off liability in situations where both the type of harm and manner of harm are foreseeable. Prior to discussing this question, it is worth noting

161. *Cf.* Baker v. International Harvester Co., 660 S.W.2d 21 (Mo. Ct. App. 1983) (hunter riding on the ladder of a moving combine, fell off and was run over).

162. *See supra* notes 75-95 and accompanying text, and *infra* notes 172-90 and accompanying text.

163. DeSantis v. Parker Feeders, Inc., 547 F.2d 357 (7th Cir. 1976).

that a plaintiff can be characterized as unforeseeable in almost any case. Courts can accomplish this by emphasizing enough details about the plaintiff to make him appear unique. Suppose a hitchhiker, wearing a purple hat with yellow polka dots, is run down by a defective car that has gone out of control. By requiring the car manufacturer to anticipate the type of hat the hitchhiker wore, a court could make it very difficult for the hitchhiker to prove that he was a foreseeable victim of the defective car. No court would require foresight of this detail because it is completely irrelevant. On the other hand, most courts would require the defendant to foresee that the plaintiff was a hitchhiker (or a bystander near the road). This detail is relevant because it relates to both the type of harm and the manner of harm threatened by the defective product. That is, the nature of the defect determines whether the product creates a risk of harm to bystanders near the road. If the defect creates a risk of causing the car to go out of control, then a hitchhiker is a foreseeable plaintiff. If it creates a risk to the owner's property, such as by causing his garage to burn down, then a hitchhiker is not a foreseeable victim. In characterizing the plaintiff, usually it makes no sense to emphasize details which have no bearing on type of harm or manner of harm.[164] Hence, this explains my earlier generalization that often the plaintiff is unforeseeable because either the type or manner of harm is unforeseeable.[165]

In some cases there is a good reason to emphasize details which do not relate to type of harm or manner of harm. These are cases where the court chooses to characterize the plaintiff as unforeseeable because under the circumstances there are good policy reasons for exonerating the defendant. One such case is *Winnett v. Winnett*,[166] discussed previously. There the court included the plaintiff's age (four years) in the characterization and found her unforeseeable. Another Illinois case, *Richelman v. Kewanee Machinery & Conveyor Co.*,[167] explains that decision as based on a reluctance to hold manufacturers of dangerous equipment responsible for harm resulting from its use as a toy.[168] *Richelman* was also a case involving a youngster injured by dangerous equipment, but that court omitted any reference to the plaintiff's age in its characterization of the plaintiff because there was no evidence that the child was playing with the equipment.[169] *Richelman* used a more general characterization (a person with a shoe width of less than 4 5/8 inches) in order to make the plaintiff foreseeable because the justification for exonerating the defendant in *Winnett* was not present in *Richelman*.

164. *See* R. KEETON, *supra* note 1, at 85.
165. *See supra* notes 152-53 and accompanying text.
166. Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974).
167. 59 Ill. App. 3d 578, 375 N.E.2d 885 (1978).
168. Richelman v. Kewanee Mach. & Conveyor Co., 59 Ill. App. 3d 578, 582, 375 N.E.2d 885, 888 (1978).
169. *Id.* at 583, 375 N.E.2d at 888.

These cases show that foreseeability is a very flexible concept that is easily manipulated by choosing which details to emphasize.[170] While judges can use characterization to implement sound policy decisions, the basis for the decision often remains hidden. This is discussed further in a later section of this Article.[171]

D. *Relationship of Proximate Cause Doctrines to Defect*

To illustrate the relationship between proximate cause doctrines and defect, it is necessary briefly to review the basic principles of defect. The original definition of defect was conservative. The Restatement of Torts (Second) section 402A embraced the consumer expectations test.[172] Under this test a product is defective only if it contained hidden or unexpected dangers.[173] It amounted to an immunity because a manufacturer was free to market dangerous products with impunity as long as the dangers were obvious.[174] A punch press which is very dangerous because it lacks a safety guard is not defective under the consumer expectations test as long as the danger is patent. It does not matter that the danger can be eliminated at little cost. Even if a product contained a hidden danger, however, a manufacturer could seek to escape liability by showing that his product was unavoidably unsafe and that the benefits of the product outweighed the risks.[175] A new drug containing an unknown risk of a serious side-effect is not defective if the apparent benefits of the drug justified its use. In essence, comment k to section 402A incorporated a risk/utility analysis in addition to the consumer expectations test. The language and history of comment k are ambiguous. It is not clear whether the comment was meant to apply only to certain drugs or to all products.[176] Under a conservative interpretation, the comment applies to all products.[177] This interpretation results in a two-part test of defect under the Restatement. A product is defective only if it contains both a hidden danger and an unreasonable danger (it was not unavoidably unsafe).[178]

Proximate cause doctrines and defect work together to narrow the scope of liability to a greater degree than either body of law by itself. An earlier

170. Passwaters v. General Motors Corp., 454 F.2d 1270, 1275-76 n.5 (8th Cir. 1972).

171. *See infra* section IV of text.

172. RESTATEMENT (SECOND) OF TORTS § 402A comments g, i (1966).

173. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 274 (1969).

174. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1558-59 (1973).

175. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1966).

176. Page, *supra* note 48, at 864-72.

177. Page, *supra* note 48, at 854-55, 867.

178. *See* Fischer, *Products Liability — Functionally Imposed Strict Liability*, 32 OKLA. L. REV. 93, 103-09 (1979).

section[179] of this Article dealt with one aspect of the relationship between defect and proximate cause doctrines. This is the notion that a product is often defective only because an intervening cause or act of misuse was foreseeable. If reasonable measures are available to guard against such acts, the manufacturer must take them. In this aspect of the relationship, the test of defect will often cut off liability short of where proximate cause doctrines would carry it. Notions of proximate cause extend the scope of liability to all foreseeable accidents; yet, the defect requirement cuts off liability short of this point in many cases. Under the consumer expectations test, products containing foreseeable risks are not defective as long as the risks are known. Under the risk/utility test, products containing foreseeable risks are not defective if the risks are reasonable.

There is another aspect of the relationship. In another type of case, proximate cause doctrines restrict liability to a greater degree than would the defect requirement. These are cases where the manufacturer of a defective product is not liable for the harm it causes because the type of harm, manner of harm, or class of persons is unforeseeable.[180] Were it not for proximate cause doctrines, these cases would all result in liability. Because the cases involve defective products which caused harm, there would be no basis for cutting off liability in the absence of proximate cause principles. Elimination of proximate cause would greatly expand the scope of liability because of such cases. Thus, the scope of liability is a function of both bodies of law.

In jurisdictions that have greatly broadened the definition of defect, proximate cause doctrines can play an even more important role in limiting the scope of liability. In some cases where it is desirable to limit liability, judges will no longer be able to use defect principles to do this. They may have to use proximate cause doctrines to reach appropriate results in such cases.

Many courts have now rejected the consumer expectations test of defect,[181] and rely exclusively on the risk/utility test.[182] This enlarges the scope of liability because it eliminates the immunity for a large class of products, those containing obvious dangers. Products with obvious but unreasonable dangers could now give rise to liability. This development has increased the importance of proximate cause doctrines because, with this class of products, they represent the only basis for cutting off liability in appropriate cases.

California is an example of a court that has gone even further. In design defect cases, that court uses the two tests of defect in the disjunctive. That

179. *See supra* notes 75-95 and accompanying text.

180. For examples of this kind of case, see *supra* note 96 and accompanying text.

181. *E.g.*, Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).

182. *E.g.*, Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974).

is, the product is defective if it either violates consumer expectations or if, in hindsight, the risks created by the product outweigh its benefits.[183] In addition, the defendant has the burden of proving that the benefits of the product outweigh its risks.[184] Under the risk/benefit part of the test, the only showing plaintiff has to make is that a design feature of the product proximately caused his harm.[185] Using the two tests in the alternative significantly expands the scope of liability because some products are defective under one test but not the other. A product containing a hidden danger that is reasonable (the new drug containing an unknown risk of a side-effect) is defective under consumer expectations but not under risk/utility. A product containing an obvious danger that is unreasonable (the punch press without the safety guard) is defective under risk/utility but not consumer expectations. By using the two tests in the alternative, California counts as defective all products that violate either test.[186]

The following example illustrates the increased usefulness of proximate cause doctrines in a state like California. Assume that an infant was given polio vaccine containing live polio virus. The infant's mother contracted polio from the vaccine because she came into contact with the infant's diapers. Assume further that the possibility of a person contracting the disease in this way is very low and was not previously scientifically knowable. The vaccine violated consumer expectations because the ordinary person who uses it would not expect it to infect the infant's mother. It would probably not be defective, however, under the Restatement. As long as the vaccine has sufficient utility to justify its use, courts would likely hold that there was no defect because the vaccine was an unavoidably unsafe product.

Under the new California test for design defect, the vaccine would be defective if it violates consumer expectations even though it does not create an unreasonable risk. Therefore, if the court desired to cut off liability, it would have to rely on proximate cause doctrines. Under its rules of proximate cause, California requires foreseeability of type of harm,[187] misuse,[188] and class of persons.[189] Therefore, a California court could easily decide the case for defendant by finding that the plaintiff was unforeseeable. Thus, at least

183. Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 429-32, 573 P.2d 443, 454-56, 143 Cal. Rptr. 225, 236-37 (1978).

184. *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.

185. *Id.*

186. For a detailed analysis of this approach to determining defectiveness, see Fischer, *supra* note 152, at 974-78.

187. Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983).

188. Dosier v. Wilcox & Crittendon Co., 45 Cal. App. 3d 74, 119 Cal. Rptr. 135 (1975); Self v. General Motors Corp., 42 Cal. App. 3d 1, 6-7, 116 Cal. Rptr. 575, 578-79 (1974).

189. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

in certain cases, a court can accomplish the same result that a more restrictive test of defect would have produced by employing proximate cause doctrines.

E. *Relation to Other Strict Liability Theories*

In strict liability cases not involving defective products courts have generally imposed a limit on liability closely analogous to the foreseeability of risk test used in negligence cases.[190] These courts limit strict liability to harm caused by the kind of risk that justifies the imposition of strict liability.[191] For example, courts justify strict liability for blasting because of the risk that explosions will harm people or their property by vibrations or impact with flying debris. If blasting frightens mother mink, causing them to kill their kittens, the blaster will not be held liable because this is not one of the risks that justify imposing strict liability on blasters.[192] Courts have generally required that the manner of harm be foreseeable as well.[193] Thus, there is no liability if an unforeseeable intervening cause brings about a risk that justified the imposition of strict liability.[194]

This test is more restrictive than the analogous test used in negligence cases in that a defendant may not be liable for all foreseeable risks;[195] he is only liable for those which fall within the rationale for imposing strict liability.[196] In the mink case, for example, the harm was clearly foreseeable to the defendant because he continued to blast after receiving notice from the plaintiff of the harm the blasting was causing.[197] He was exonerated because the foreseeable risk was not one of the risks justifying strict liability. The strict products liability cases are more analogous to negligence cases than other strict liability cases in that they limit the scope of liability to foreseeable risks or injuries.[198]

IV. POLICY ANALYSIS

Products liability rules represent an attempt to achieve an appropriate balance between conflicting interests, those of accident victims on the one

190. Harper, *supra* note 10, at 1006-08; H. HART & A. HONORE, *supra* note 1, at 257; R. KEETON, *supra* note 1, at 104-05; Note, *supra* note 15, at 715-16.

191. R. KEETON, *supra* note 1, at 104-05; Note, *supra* note 15, at 715-16; RESTATEMENT (SECOND) OF TORTS §§ 507(2), 509(2), 519(1) (1966).

192. Foster v. Preston Mill Co., 44 Wash. 2d 440, 443, 268 P.2d 645, 648 (1954).

193. Harper, *supra* note 10, at 1009.

194. *Id.*

195. Note, *supra* note 15, at 717.

196. R. KEETON, *supra* note 1, at 104.

197. Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954).

198. Note, *supra* note 15, at 721-22.

hand and product manufacturers on the other. The often stated policies of compensation and deterrence protect victims because they nearly always point in the direction of imposing liability. The countervailing policy, which is not mentioned as often, is to protect useful enterprises from unduly harsh liability.[199]

Any body of law which is designed to achieve an appropriate balance between these conflicting policies ought to be formulated and applied with those policies in mind.[200] The proximate cause and defect rules described in this Article do bear some relationship to these policies. Foreseeability of risk is often used as the standard of liability. It is relevant to the product liability policies. Manufacturers are better able to spread losses they can anticipate. At the same time, industry is protected to some degree because it does not have to pay for unforeseeable losses.

The interaction of the proximate cause and defect doctrines generally limit the use of foreseeability of harm as the criterion for cutting off liability to cases of harm caused by enigmatic human behavior. This is because most courts require foreseeability of misuse and intervening causes. These usually arise from inappropriate conduct of third parties occurring after the product is placed on the market. Thus, liability depends on the manufacturer's ability to anticipate such behavior. On the other hand, courts often impose liability for unforeseeable harm in cases where the harm is unforeseeable because of an inadequacy of technology, i.e., manufacturing flaws and perhaps some generic risks.

There also is a logical basis for this dichotomy. Manufacturers have more control over technology than users, consumers and bystanders. Therefore, it may make sense to impose the most stringent form of liability in cases where improvements in technology provide the greatest hope for reducing the risk. Only the manufacturer has the power to modify its quality control program and its research and development program so as to increase product safety. This may explain why courts do not exonerate manufacturers who are justifiably ignorant of manufacturing defects in their products. It may also be the reason that some courts impose liability for harm caused by unknown generic risks as well. Manufacturers have the best opportunity to make such products safer, and use of hindsight arguably gives them a greater incentive to do so.

Manufacturers are far less able to prevent accidents that are unforeseeable because of unpredictable human behavior. These are cases where the accident is unforeseeable because of misuse or an intervening cause. This category includes most unforeseeable accidents except those involving unknown manufacturing defects or generic risks. The deterrence goal may be

199. Wilson, *Products Liability Part II: The Protection of the Producing Enterprise*, 43 CALIF. L. REV. 809 (1955).

200. Magnuson v. Rupp Mfg., 285 Minn. 32, 45, 171 N.W.2d 201, 209 (1969).

far less appropriate in such cases because the parties involved in the accident may be better able to prevent the accident than the manufacturer. Risk spreading may also be less appropriate. The public should not have to subsidize people who injure themselves through inappropriate use of products that are reasonably safe for proper use. Clearly, there is a basis for restricting the manufacturer's liability in such cases to situations where the behavior was anticipated.

It is, however, a mistake to place so much emphasis on foresight. While it is often relevant to the question of the proper scope of liability, it ought not be controlling in all cases. For example, it may not always be desirable to hold manufacturers responsible for the consequences of inappropriate behavior of third parties, even if that behavior is foreseeable.[201] Indeed, courts have sometimes refused to hold manufacturers liable for such accidents.[202] In cases where the user could have prevented the accident at far less cost than the manufacturer, risk spreading and deterrence may not be in the public interest. The public ought not bear such losses through higher prices for products. It also ought not be forced to tolerate the cost and inconvenience of safety devices necessary only to protect the utterly foolish user. On the other hand, cases may arise where the policies underlying strict liability can be furthered by imposing liability for unforeseeable harm. It is not possible to devise a simplistic formula which will consistently yield sound results.[203] Foreseeability should be used as the criterion for imposing liability only in cases where judges determine that it is appropriate.

Many matters other than foreseeability are also relevant in determining the appropriateness of imposing liability.[204] This author has suggested the following factors:[205]

I. Risk Spreading
   A. From the point of view of consumer.
      1. Ability of consumer to bear loss.
      2. Feasibility and effectiveness of self-protective measures.
         a. Knowledge of risk.
         b. Ability to control danger.
         c. Feasibility of deciding against use of product.
   B. From the point of view of manufacturer.

201. Epstein, *supra* note 2, at 654-55.

202. *See supra* notes 83-95 and accompanying text.

203. G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 96 (1980); Kiely, *The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's The Common Law Tradition*, 24 DE PAUL L. REV. 914, 916 (1975).

204. Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 808 (1983).

205. Fischer, *Products Liability — The Meaning of Defect*, 39 MO. L. REV. 339, 359 (1974); Fischer, *supra* note 178, at 114-15.

1. Knowledge of risk.
2. Accuracy of prediction of losses.
3. Size of losses.
4. Availability of insurance.
5. Ability of manufacturer to self-insure.
6. Effect of increased prices on industry.
7. Public necessity for the product.
8. Deterrent effect on the development of new products.

II. Safety Incentive

A. Likelihood of future product improvement.

B. Existence of additional precautions that can presently be taken.

C. Availability of safer substitutes.

Other authors have also suggested a variety of relevant factors.[205] Courts would reach better results if they systematically took all relevant consider-

206. Professor Wade has suggested these factors:

(1) The usefulness and desirability of the product — its utility to the user and to the public as a whole.

(2) The safety aspects of the product — the likelihood that it will cause injury and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 837-38 (1973). Professor Shapo suggests these factors:

1. The nature of the product as a vehicle for creation of persuasive advertising images, and the relationships of this factor to the ability of sellers to generate product representations in mass media;

2. The specificity of representations and other communications related to the product;

3. The intelligence and knowledge of consumers generally and of the disappointed consumer in particular;

4. The use of sales appeals based on specific consumer characteristics;

5. The consumer's actions during his encounter with the product, evaluated in the context of his general knowledge and intelligence and of his actual knowledge about the product or that which reasonably could be ascribed to

ations into account in deciding the appropriate scope of liability.

In reality, courts often take many matters, other than pure factual foreseeability, into account in deciding cases. They are able to do this because the concept of foreseeability is sufficiently flexible to give courts great discretion in deciding cases.[207] Courts which use this flexibility to take other factors into account do not use foreseeability in a purely factual sense, but as a shorthand way of expressing social policy.[208] The flexibility occurs because the court has discretion about how much detail to include in its characterization of what must be foreseeable.[209] An event becomes less foreseeable

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him;

6. The implications of the proposed decision for public health and safety generally, and especially for social programs that provide coverage for accidental injury and personal disability;

7. The incentives that the proposed decision would provide to make the product safer;

8. The cost to the producer and other sellers of acquiring the relevant information about the crucial product characteristic and the cost of supplying it to persons in the position of the disappointed party;

9. The availability of the relevant information about the crucial product characteristic to persons in the position of the disappointed party and the cost to them of acquiring it;

10. The effects of the proposed decision on the availability of data that bear on consumer choice of goods and services;

11. Generally, the likely effects on prices and quantities of goods sold;

12. The costs and benefits attendant to determination of the legal issues involved, either by private litigation or by collective social judgment;

13. The effects of the proposed decision on wealth distribution, both between sellers and consumers and among sellers.

Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370-71 (1974).

Professors Montgomery and Owen suggest the following:

(1) The cost of injuries attributable to the condition of the product about which the plaintiff complains — the pertinent accident costs.

(2) The incremental cost of marketing the product without the offending condition — the manufacturer's safety cost.

(3) The loss of functional and psychological utility occasioned by the elimination of the offending condition — the public's safety cost.

(4) The respective abilities of the manufacturer and the consumer to (a) recognize the risks of the condition, (b) reduce such risks, and (c) absorb or insure against such risks — the allocation of risk awareness and control between the manufacturer and the consumer.

Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 818 (1976).

207. Caputzal v. Lindsay Co., 48 N.J. 69, 75, 222 A.2d 513, 516 (1966); Venezia v. Miller Brewing Co., 626 F.2d 188, 191 (1st Cir. 1980).

208. Howes v. Hansen, 56 Wis. 2d 247, 257-58, 201 N.W.2d 825, 830 (1972); Caputzal v. Lindsay Co., 48 N.J. 69, 75-76, 222 A.2d 513, 516-17 (1966).

209. Passwaters v. General Motors Corp., 454 F.2d 1270, 1275-76 n.5 (8th Cir. 1972); H. HART & A. HONORE, *supra* note 1, at 92; R. KEETON, *supra* note 1, at 49.

as more details are included in its description. For example, suppose a child is permitted to operate a riding lawn mower in the presence of other children, and he runs over another child. If a court includes all these details in its description of the accident, the misuse would be unforeseeable.[210] On the other hand, the court could find that the use was foreseeable by characterizing the case as involving the use of a mower to cut grass.[211]

The flexibility of the concept has disadvantages. Only a court that is in tune with the policies underlying strict liability can apply the rules so as to further those policies. Yet, since the formulation of the rule does not require consideration of underlying policies, some judges may reach incorrect results by not applying the rules in this way. Furthermore, foreseeability may not be sufficiently flexible to achieve correct results in all cases. While there is a large grey area where courts may decide an issue either way, the flexibility is not infinite. It does provide concrete guidance in many cases which do not fall within the grey area.[212] Even when correct results are reached, however, the true basis of the decision is often obscured. This approach creates unnecessary cynicism about our legal system, and makes it harder to predict the legal consequences of one's acts.

A better approach is explicitly to decide proximate cause as a matter of law on the basis of all relevant factors rather than relying exclusively on factual foreseeability. At least one products liability case has done this.[213] This is analogous to the way courts decide abnormally dangerous activity cases. That is, they impose liability only for the kinds of risks that justify imposition of strict liability. Under the suggested approach, a judge would refer questions of fact, such as foreseeability, to the jury only in cases where he determines that the issue is relevant to a determination of the proper scope of liability. The judge would then decide proximate cause as a matter of law in light of both the jury's findings and the relevant policy considerations listed above.

This method would achieve consistency of result because such judicial determinations would be subject to review. Ultimately, a single appellate court would have the final say. After a number of similar cases were decided by the highest court in a jurisdiction, it should become possible to predict the results of future cases with greater accuracy than is now attainable. The jury would decide questions of fact only. This is appropriate for several reasons. A jury may not be competent to evaluate many of the policy considerations relevant to the determination of the proper scope of liability.[214]

210. Hays v. Western Auto Supply Co., 405 S.W.2d 877, 884 (Mo. 1966).
211. *See* Eshbach v. W. T. Grant's & Co., 481 F.2d 940, 943 (3d Cir. 1973).
212. *See* H. HART & A. HONORE, *supra* note 1, at 232-34.
213. Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 862-64 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968).
214. Powers, *supra* note 204, at 808.

Furthermore, uniformity cannot be achieved if juries decide these issues because each case is decided by a different jury without reference to past decisions by other juries. This method requires courts to consider all relevant factors and explicitly state the reasons for their decisions rather than to resort to legal fictions. To illustrate how this approach would work, consider the farm machinery accident cases that dealt with the question of whether a young child was an unforeseeable victim as a matter of law.[215] A major issue in those cases is the degree to which manufacturers, and ultimately the public, should be responsible for the consequences of a parent's failure properly to supervise his child. In deciding such questions courts should consider a number of issues, including the following: the relative ability of the manufacturer and the parent to minimize the risk, the effect of the increased scope of liability on the cost of the product and the availability of liability insurance, and the ability of the parent to bear the cost of the accident through his own first party insurance. Courts should confront these concerns directly. This is far better than purporting to decide such cases solely on the basis of foreseeability without mentioning that these kinds of policy considerations played an important part in determining what is foreseeable.

This approach to proximate cause would be particularly appropriate in light of the changes that have taken place in the definition of defect. When the consumer expectations test was widely used, we had what amounted to an immunity that narrowly restricted the scope of liability. The risk/utility test extends liability further and is much less precise. Also, in states where the burden of proof on this issue is shifted to the defendant, many fewer directed verdicts will be granted.[216] This increases the risk of over-deterrence because the unpredictability of jury verdicts creates uncertainty about the scope of liability. Therefore, judges ought to use proximate cause to avoid over-deterrence. They should also restrict liability in cases involving the kinds of losses that the public would not want to spread and involving the kinds of accidents that strict products liability is not likely to deter.

V. CONCLUSION

Because courts have broadened the definition of defect significantly, proximate cause doctrines are playing an increasingly important role in restricting the scope of liability within proper bounds. The current proximate cause doctrines are complex, confusing, and their application often obscures the true basis for the decision. One purpose of this Article is to suggest an approach to proximate cause that is a more satisfactory way of implementing the policies underlying strict liability. Until the courts adopt a new approach, however, lawyers and judges must work within the confines of the present

215. *See* cases cited *supra* notes 166-67, 210.
216. *See* Fischer, *supra* note 152, at 976-78.

rules. The other purpose of this Article is to give some insight into the nature and operation of these rules so that they can be used to achieve appropriate results.